

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TARA MELLINGER,

Plaintiff,

v.

KENNETH J. BRAITHWAITE,

Defendant.

CASE NO. C18-5838 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Defendant Secretary of the Navy's ("the Navy") motion for summary judgment. Dkt. 15. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part and denies in part the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On October 16, 2018, Plaintiff Tara Mellinger ("Mellinger") filed a complaint against the Navy alleging sexual harassment and retaliation/wrongful termination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* Dkt. 1.¹

¹ Mellinger was married after the events in this case and changed her name. Dkt. 21 at 1. Some of the evidence in this case refers to Mellinger using her previous name, Tara Convis. *Id.* The Court will use the name Mellinger throughout for clarity.

1 On February 13, 2020, the Navy moved for summary judgment. Dkt. 15. On
2 February 23, 2020, Mellinger responded. Dkt. 21. On March 6, 2020, the Navy replied.
3 Dkt. 23. On April 7, 2020, the Navy filed a notice of supplemental authority. Dkt. 27.

4 On July 10, 2020, the Court requested a surreply from Mellinger. Dkt. 32. On July
5 16, 2020, Mellinger surreplied. Dkt. 33. On July 17, 2020, the Navy filed a surreply
6 objecting to the scope of Mellinger's surreply and requesting leave to surreply. Dkt. 34.
7 On July 20, 2020, the Court granted the Navy leave to surreply. Dkt. 36. On July 24,
8 2020, the Navy surreplied. Dkt. 37. On July 31, 2020, the Court issued an order denying
9 the Navy's motion. Dkt. 44.

10 On August 14, 2020, the Navy filed a motion for reconsideration arguing that the
11 Court should amend its order because it granted summary judgment on one theory of
12 Mellinger's retaliation claim. Dkt. 45. On August 31, 2020, the Court granted the Navy's
13 motion, Dkt. 49, and now issues this amended order.

14 II. FACTUAL BACKGROUND

15 Mellinger began employment with the Navy at the Puget Sound Naval Shipyard
16 on August 24, 2015. Dkt. 1, ¶ 2.2. She worked in Shop 71, the painting shop. *Id.* Her
17 supervisor was Josh Austin ("Austin"). Dkt. 22-1 at 1.² She did not receive any type of
18 equal opportunity employment-related training. *Id.* Her stand-in superintendent was
19 Kevin Jones, and her Work Lead was Dom Bryant ("Bryant"). *Id.* at 3. Mellinger was a
20 probationary employee throughout the duration of the period at issue. Dkt 18, ¶ 2.

21
22 ² The Court cites ECF page numbering throughout.

1 **A. Overview of Harassment as Described in Post-Termination Investigation**

2 In a November 14, 2016 declaration Mellinger gave in the Navy's investigation of
3 her case, Mellinger declares that a male co-worker, Stephen Nnadede ("Nnadede") began
4 sexually harassing her during the first week after she finished training, in October or
5 November of 2015. Dkt. 22-1 at 4. In a letter dated May 26, 2016, attached to the
6 November 14, 2016 declaration, she explained that Nnadede would "constantly make
7 sexual jokes or ask questions about my sexual life all of which I did not want to talk
8 about. I would either blatantly tell him I did not want to talk about it, or I would try and
9 find a way to either change the subject or 'play dumb,' like I did not understand that he
10 was making sexual remarks and coming on to me." Dkt. 22-1 at 9. She described
11 comments Nnadede made such as "I bet your boyfriend must be really good in bed to
12 keep you around!" followed by "I wish I had someone like you." *Id.* She described an
13 incident where Nnadede showed her a picture of his wife and in response to her comment
14 that his wife was beautiful and he was lucky, Nnadede stated "she's ok, it would have
15 been better if I would have waited and found you then I wouldn't be so lonely." *Id.*
16 Mellinger explained that these statements were specific examples of conversations which
17 "happened quite often." *Id.*

18 Mellinger explained that Nnadede manipulated her into giving him her phone
19 number and called and texted repeatedly despite her telling him she did not talk to
20 coworkers outside of work. *Id.* When she emphasized that they were coworkers and not
21 friends, and that she was in a happy relationship and had a child, Nnadede stated "well he
22 can have you at home and I can have you at work, I think that is only fair?" *Id.* at 9–10.

1 She also explained that Nnadede attempted to engineer a bet where he would get to drive
2 her to her parking place after work, causing her to run three-quarters of a mile to her car
3 to avoid that outcome. *Id.* at 10.

4 Mellinger's letter also stated that she would catch Nnadede staring at her butt
5 whenever she was not looking. *Id.* She stated that Nnadede asked her whether she had
6 been working out because her butt looked bigger, and she got angry and told him to stop,
7 but he continued. *Id.* She then "tried to make sure [she] never wore any clothes that could
8 be considered suggestive." *Id.* She testified that she did not remember specifically when
9 Nnadede had stared at her butt and that she had not asked him to stop staring at her butt.
10 Dkt. 16-1 at 10–12.³ She testified that Nnadede commented during work that she had
11 "good hips and a big butt" and that she did not remember what she said in response. *Id.* at
12 13. The letter stated that she would be late to work to avoid being assigned to work near
13 Nnadede. Dkt. 22-1 at 10. It also explained that on April 21, 2016, she found herself
14 alone with Nnadede and told him her knees were hurting, and he replied "well maybe you
15 shouldn't spend so much time on your knees." *Id.* After she tried to change the subject,
16 she felt a twinge in her back and remarked on it, and he replied "well we all know women
17 spend a lot of time on their backs." *Id.*

18 Mellinger declared that Austin told Jesse Case, one of Mellinger's co-workers,
19 that Austin was afraid Mellinger would file an Equal Employment Opportunity ("EEO")
20 claim. Dkt. 22-1 at 4. She declared that because Austin was telling other workers of his

21
22 ³ Dkt. 16-1 is Mellinger's deposition in this case, while Dkt. 16-2 is Mellinger's deposition before
the Equal Employment Opportunity Commission.

1 fear, she knew that he did not want her to complain and she feared he would retaliate
2 against her. *Id.* However, she testified that she did not think anyone in management at the
3 Navy knew Nnadede was harassing her before she reported harassment to Austin on
4 April 22, 2016. Dkt. 16-1 at 14. Austin declared that he never told anyone he was afraid
5 Mellinger would file an EEO claim and he was not afraid she would do so. Dkt. 17, ¶ 27.

6 **B. Lateness**

7 Mellinger admitted in her declaration that during her last two months of
8 employment she had been late to work and sometimes failed to notify Austin that she
9 would be late. Dkt. 22-1 at 6. She also admitted she had been counseled on attendance
10 issues in January 2016 and March 2016. *Id.* In her letter, she explained that she began to
11 be late for work in order to avoid being assigned to a job where she would be near
12 Nnadede, though she “blam[ed] it on my son not dealing with me leaving very well in the
13 morning.” *Id.* at 10. She testified that she told Austin “whatever he would listen to at that
14 point.” Dkt. 16-2 at 11.

15 Austin declared that when employees were late, particularly when they did not
16 notify him as Mellinger sometimes did not, that made it very difficult for him to schedule
17 and staff the day’s work. Dkt. 17, ¶ 5. Austin declared that he met with Mellinger for a
18 pre-action interview to discuss her lateness on March 18, 2016. *Id.* ¶ 8. He declared that
19 he offered to request a different start time or different crew for Mellinger from the
20 resource office to accommodate her schedule and offered to help her write a hardship
21 letter in support of a request for a different shift, but she declined these offers and told
22

1 him the crew's start time would no longer be a problem. *Id.* ¶ 9.⁴ He also declared that
2 after this meeting, he told the resource office about Mellinger's attendance problems, and
3 the resource office issued a letter of caution. *Id.* ¶ 11. Austin gave Mellinger the letter on
4 or around April 8, 2016, which stated in part "future misconduct of any kind may result
5 in formal disciplinary action, up to and including your removal from employment." *Id.*
6 Mellinger testified that she asked human resources sometime between February and April
7 of 2016 if she could be assigned to a different shift because of challenges getting her son
8 to daycare, but they said it wasn't possible with the "helper trainer school." Dkt. 16-2 at
9 14–15.

10 Mellinger stated in her letter that she requested to work weekends to avoid
11 Nnadede and that her "entire work life was miserable." Dkt. 22-1 at 6. Mellinger testified
12 that she was "purposely late to work between 70 and 80 percent of the time because if I
13 was late to work I wouldn't be assigned to the same jobs a[s] Stephen Nnadede." Dkt. 16-
14 2 at 12–13.

15 Austin declared that Mellinger was between six minutes and two hours late on
16 eleven days between February 29, 2016 and April 20, 2016, and entirely failed to appear
17 for a shift she had volunteered to work on April 16, 2016. Dkt. 17, ¶ 7. He declared that
18 Mellinger was out sick from March 7, 2016 through March 11, 2016 and on March 14,
19 2016, and on vacation from March 28, 2016 through April 7, 2016, making her "late on
20 many of the days she actually worked from late February through April 2016." *Id.*

21 _____
22 ⁴ The shop resource office is similar to human resources for specific shops at PSNS, while the
Navy's Human Resources department serves PSNS in general. Dkt 18, ¶ 1.

1 Regarding other coworkers, Mellinger declared that a male coworker, Virgo Banks
2 (“Banks”) was regularly tardy, “much later than I was and way more often.” Dkt. 22-1 at
3 6. When she asked Banks if he had ever been written up for being late, he said he had not.
4 *Id.* at 7. Austin declared that Banks was late on substantially fewer occasions than
5 Mellinger, and, unlike Mellinger, regularly notified Austin when he was going to be late
6 which allowed Austin to plan for his absences. Dkt. 17, ¶ 16. Specifically, Austin
7 declared that Banks was late on four instances between late February and April 2016. *Id.*

8 On April 20, 2016, Austin declared that he met with Mellinger for a second pre-
9 action meeting on the lateness issue. Dkt. 17, ¶ 12. They also discussed an unauthorized
10 visit to the union office she had made the day before, April 19, 2016, and Austin
11 completed a second pre-action investigation report regarding that absence. *Id.* ¶ 14.
12 Austin declared that Mellinger told him she had submitted a hardship letter that morning
13 and told him that she had not spoken to the resource office previously. *Id.*

14 Austin recommended that Mellinger be terminated due to her attendance issues
15 and forwarded a written recommendation and his report to the resource office. Dkt. 22-4
16 at 4; Dkt. 17, ¶ 15. That same day, Deena Mead (“Mead”), the shop resources manager,
17 received Austin’s pre-action reports regarding Mellinger’s tardiness and the trip to the
18 union office and also made a written recommendation that Mellinger be terminated based
19 on repeated tardiness. Dkt. 18, ¶ 5.

C. Report of Harassment

On April 21, 2016, as noted in Mellinger's letter, Nnadede made sexual comments about Mellinger spending too much time on her knees and back despite her efforts to change the subject. Dkt. 22-1 at 10.

On April 22, 2016, a Friday, Mellinger told Austin that Nnadede was sexually harassing her and she wanted Austin to talk to Nnadede and make it stop. Dkt. 22-1 at 4, 11; Dkt. 1, ¶ 2.8. Mellinger explained in her letter that she had put off telling Austin about the harassment because he was "really high strung and inconsistent in how he would respond to workers coming to him with problems." Dkt. 22-1 at 11. Mellinger testified that this was the first time she had told anyone at the Navy about Nnadede's comments. Dkt. 16-1 at 9. Austin declared that he had no awareness of Nnadede's harassment prior to Mellinger's complaint. Dkt. 17, ¶ 17.

Mellinger declared that Austin told her he did not think he could talk to Nnadede and told her that he needed to talk to his supervisors and make an official report. Dkt. 22-1 at 4. Austin declared that he asked both Mellinger and Nnadede for written statements and forwarded the statements to the shop's resource office. Dkt. 17, ¶ 18. Mellinger testified that the written statement matched what she told Austin. Dkt. 16-1 at 6. Michael Riedel ("Riedel"), Mellinger's third-level supervisor, declared that according to his notes he and Mead were informed of Mellinger's allegations that day, met with her immediately, and had her write a statement. Dkt. 22-3 at 3.

The written statement Mellinger provided to Austin described an incident in February 2016 when Nnadede said "[s]o how excited are you to go to Japan, I bet you are

1 going to be extremely busy in your hotel room?” *Id.* Mellinger replied that she expected
2 to be busy sight-seeing, and when Nnadede persisted, she stated “I really don’t want to
3 talk about my sex life with a coworker.” *Id.* She described an incident at an unspecified
4 time when Nnadede asked her “[w]hat do you think Tara[,] does a man[’]s penis size
5 matter?”, she responded “I’m not sure,” and he stated “I bet your man knows how to
6 work it, he must know to keep you around.” *Id.* at 29. She also described the April 21,
7 2016 incident where Nnadede implied that Mellinger spent a lot of time on her knees and
8 back. *Id.* at 28. Mellinger wrote in her statement that “[a]ll of these conversations were
9 extremely awkward and uninvited even after I explained I did not want to talk on these
10 subjects.” *Id.* at 29.

11 The written statement also explained that Nnadede texted Mellinger even when
12 she did not respond and that he called her “numerous times after I had explained on a few
13 occasions that I did not like talking on the phone with co-workers unless it pertained to
14 work.” *Id.* at 28. When Nnadede said “well I thought we were friends, don’t friends call
15 eachother [sic],” Mellinger responded that they were coworkers. *Id.* at 29.

16 An exhibit attached to Mellinger’s deposition shows some text messages between
17 her and Nnadede related to her absence from work and a work call. Dkt. 16-1 at 35. She
18 testified that she did not remember whether there were additional texts. *Id.* at 21.

19 Mellinger alleges that the Navy’s policies call for a fact-finding investigation for
20 general misconduct or rule or safety infraction concerns, conducted by a supervisor to
21 determine whether discipline is appropriate. Dkt. 1, ¶¶ 2.11, 2.13. She alleges that the
22 policies call for an administrative investigation when a complaint or concern raises the

1 potential for a discrimination or harassment complaint, conducted by an independent,
2 outside investigator who produces a written report. *Id.* ¶¶ 2.12–2.13.

3 Mellinger alleges that the Navy did not initiate an administrative investigation into
4 her report but declared that the stand-in supervisor assured her she would not be assigned
5 to work in Nnadede’s presence pending an investigation. Dkt. 1, ¶ 2.15; Dkt. 22-1 at 4, 5,
6 11. Mead declared that she took Mellinger’s complaint to the Navy office which decides
7 whether an administrative investigation or a fact-finding investigation is necessary and
8 was instructed to proceed with a fact-finding investigation. Dkt. 18, ¶ 12.

9 **D. Continuing Harassment**

10 Mellinger declared that the next Monday, April 25, 2016, Bryant assigned her to
11 work in an area in close proximity to Nnadede. Dkt. 22-1 at 5–6, 11. She testified that
12 Nnadede was working on the flight deck, above the deck where she was assigned, “[a]nd
13 all of a sudden the people on the flight deck were done with their jobs and decided to
14 come hang out with us. He was on that job.” Dkt. 16-2 at 20.

15 Mellinger explained in her letter that when Nnadede came into her workspace, he
16 again stared at her butt. Dkt. 22-1 at 11. She testified that she left the area, waited for
17 Austin for almost an hour, and when he did not appear, talked to Bryant. Dkt. 16-2 at 20.
18 She testified that she began to tell Bryant that she had been told she was not supposed to
19 be working with Nnadede, but “ended up not finishing the sentence, because at that point
20 I had realized there was no point because he probably didn’t know anything . . .” Dkt. 16-
21 2 at 20. Bryant declared that he had been told to keep Mellinger and Nnadede apart and
22 did not recall having Mellinger work alongside Nnadede. Dkt. 22-2 at 3. Mellinger

1 testified that she did not remember whether she had said anything to Bryant other than
2 that Nnadede was in her workspace, and that Bryant responded “It’s fine. Go back to
3 work.” Dkt. 16-1 at 15. She testified that when she went back to work, she made every
4 effort to avoid Nnadede, but he continued to stare at her, and she “felt like prey” for the
5 remaining two or three hours of her shift. Dkt. 16-2 at 22.

6 Riedel declared that on that same day, he had interviewed each of the three
7 witnesses Mellinger had listed in her statement and “had a pre-action investigation
8 conducted on Mr. Nnadede.” Dkt. 22-3 at 3–4. Reidel also declared that he concluded
9 Mellinger’s allegations were unsubstantiated, though it is unclear whether this occurred
10 that same day or at another time. *Id.* at 4.

11 Mellinger testified that after she spoke to Austin on April 22, 2016 Nnadede did
12 not call, text, or offer her rides for the remainder of her employment, and she did not
13 recall whether Nnadede spoke to her again. Dkt. 16-1 at 17.

14 **E. Camera Phone**

15 On April 26, 2016, Austin saw Mellinger had a prohibited camera on her cell
16 phone at work, reported her to security, and reported the violation to the resource
17 department with the recommended that she be terminated. Dkt. 17, ¶¶ 21–23.

18 Mellinger declared that during the incident in question on April 26, 2016, she was
19 seated next to Banks, who also had a prohibited camera on his cell phone but Austin did
20 not ask to see the phone and so Banks was not caught or disciplined. Dkt. 1, ¶ 2.18; Dkt.
21 22-1 at 7. Mellinger declared that there was no way Austin could have failed to see
22 Banks’s phone and that Banks had been caught with a phone on an earlier date. Dkt. 22-1

1 at 7. She testified that she knew Banks had a camera phone on April 26th because she had
2 watched him take a picture of himself with it a few hours previously and watched him put
3 the phone “down on his lap as soon as Josh Austin walked through.” Dkt. 16-2 at 24.
4 However, when asked at deposition whether Austin saw Banks’s phone on April 26,
5 2016, Mellinger replied that she did not want to speculate, and when asked if she had a
6 hunch either way, she responded “I’m generally wrong, so I don’t, I don’t know.” *Id.* at
7 25.

8 Austin declared that he was seated across the table from Mellinger, saw that her
9 phone looked like an iPhone, and “[b]ecause I did not remember ever seeing her with a
10 phone before, I asked her if the phone had a camera in it.” Dkt. 17, ¶ 21. Austin declared
11 that Mellinger “denied that the phone had a camera, and quickly put the phone in her
12 pocket.” *Id.* Austin declared that quickly putting the phone away seemed suspicious, so
13 he asked to see the phone and found that it had an operational camera. *Id.* Austin also
14 declared that had Mellinger self-reported, he would have taken her to security but would
15 not have recommended her termination. *Id.* ¶ 24. Further, Austin declared that he has
16 never seen other members of his crew “including but not limited to Virgo Banks, with a
17 camera phone or any type of camera,” and that if he had, he would have reported it to
18 security. *Id.* ¶ 25.

19 Mellinger declared that she knew having a camera on her phone in the Controlled
20 Industrial Area (“CIA”) was a direct violation of policy. Dkt. 22-1 at 7. Mellinger
21 declared that though Austin had testified he did not know Banks had a phone, Austin had
22 used his work phone to call and text Banks’s cell phone while Banks was at work. Dkt.

22-1 at 7. Mellinger declared that a supervisor named Charlie Parker (“Parker”) had caught Banks with a camera phone three months after he was hired but gave Banks the option to self-report and he was disciplined but not fired. *Id.* at 7. Mellinger stated in her letter that Banks was also a probationary employee. Dkt. 22-1 at 11. Mellinger also declared that another male worker on Parker’s crew was caught by supervisor named Jeremy Seevers with a camera cell phone and told to take the phone to his car without being disciplined. *Id.* at 7. That worker was then caught by a higher-level supervisor and was suspended for five days but not fired. *Id.*

Another supervisor in Shop 71, Keith Clark (“Clark”) declared that “the decision on whether to report an employee who is caught with the phone or just let them go turn it in to security is up to the supervisor.” Dkt. 33-1 at 8. He declared that in his experience in the shop, the general practice for supervisor is that the first time an employee is caught, “the supervisor tells the employee to take the phone out of the shipyard right away, but we don’t report them for discipline.” *Id.* He also declared that

Over the years since the cell phone rules were put in place, I probably caught 5 or so employees, probationary and non-probationary with cell phones that had cameras. I’ve also seen other supervisors do the same. Some of them would deny it and then we (supervisors) would tell them to hand it over and find out it was a camera phone. We gave employees a chance to self-report to security or put their phones in the security box, or just take the phone to their cars if it was the first time we ever saw them with a camera phone.

Id. at 9.

Mead declared that Mellinger’s version of Banks’s previous experience with a camera phone is incorrect. Dkt. 18, ¶ 10. Mead declared that during Banks’s second week

1 of work, he realized he had a camera phone in his pocket, immediately powered the
2 phone off, went to the shoe trailer to put on his work-required boots, and then reported
3 himself to his supervisor. *Id.* Mead declared that employees who self-report are typically
4 treated more leniently because they have demonstrated responsibility and understanding
5 of the rules. *Id.*

6 Additionally, Mead declared that she was not aware of any probationary employee
7 at PSNS who was caught with a camera in the CIA and was not discharged. *Id.* ¶ 7. She
8 declared that between 2016 and 2017, eleven probationary employees at PSNS were
9 caught with cameras in the CIA and all were terminated. *Id.* ¶ 8. Mead also declared that
10 the unnamed employee on Parker's crew was not a probationary employee. Dkt. 26, ¶ 1.
11 Robin Jones, Deputy Production Resources Administrative Manager for Code 900A at
12 PSNS, covering Shop 71, declared that supervisors do not have authority to choose
13 whether or not to report camera phone violations. Dkt. 41, ¶ 2. She declared that
14 supervisors are required to report camera phone violations to both the resource office and
15 security. *Id.*

16 Reidel reviewed Mellinger's file and agreed with Austin's recommendation to
17 terminate Mellinger based on the violation and her attendance issues. Dkt. 22-3 at 4.
18 Mead also reviewed the violation and recommended termination based on the violation
19 and the attendance issues. Dkt. 22-4 at 4. Mead's recommendation that Mellinger be
20 terminated for attendance issues was still pending at this point. Dkt. 18, ¶ 5. Reidel
21 forwarded his recommendation to human resources and Dan Cox ("Cox") that same day.
22 Dkt. 22-4 at 5. Mead declared that she believed Cox made the termination decision, but

1 she issued the termination action. Dkt. 22-4 at 5. Cox declared that he reviewed the
2 supporting paperwork and letter of termination, felt the recommendation to terminate was
3 supported, and signed the termination letter issued to Mellinger. Dkt. 16-3 at 4. He
4 declared that discipline other than termination would have been considered at the shop
5 level by “Mr. Reidel and his folks,” but the violations he reviewed were “more than
6 adequate grounds to recommend termination.” *Id.* at 5. Cox also declared that he had no
7 knowledge whatsoever of Mellinger’s harassment complaint at the time he made the
8 termination decision. *Id.* at 5.

9 On April 27, 2018, Mellinger was terminated. Dkt. 1, ¶ 2.19. The termination
10 letter listed two reasons for the termination—her lateness and failure to notify her
11 supervisor about being late over the preceding two months, and the camera phone
12 violation. Dkt. 22-5 at 2. Mellinger declared she believed she was terminated based on
13 sex because “[t]he probationary workers who were tardy all the time and were caught
14 with camera cell phones were not fired. They were male and had not made sexual
15 harassment complaints.” Dkt. 22-1 at 8.

16 After her termination, Mellinger alleges that her “second level” supervisor asked
17 her coworkers whether they had observed the sexual harassment she alleged. Dkt. 1, ¶
18 2.20. Mellinger identified three co-workers who witnessed some of the harassment—
19 Jeffrey Sloan, Banks, and Josh Brown. Dkt. 22-1 at 5. Each denied witnessing
20 harassment, and Nnadede denied engaging in harassment. *Id.* Mellinger declared that
21 each was lying because they did not want to get fired as “[r]etaliation is a fact of life at
22 the [N]avy base.” *Id.* In June 2016, the Navy issued a report “concluding that

1 [Mellinger's] allegations of sexual harassment were unsubstantiated by her co-workers
2 who remained employed after her termination." Dkt. 1, ¶ 2.21. Mellinger declared this
3 was because "[t]he Navy is never going to find itself guilty of anything." Dkt. 22-1 at 6.

4 III. DISCUSSION

5 A. Summary Judgment Standard

6 Summary judgment is proper only if the pleadings, the discovery and disclosure
7 materials on file, and any affidavits show that there is no genuine issue as to any material
8 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
9 The moving party is entitled to judgment as a matter of law when the nonmoving party
10 fails to make a sufficient showing on an essential element of a claim in the case on which
11 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
12 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
13 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
14 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
15 present specific, significant probative evidence, not simply "some metaphysical doubt").
16 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
17 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
18 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
19 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d
20 626, 630 (9th Cir. 1987).

21 The determination of the existence of a material fact is often a close question. The
22 Court must consider the substantive evidentiary burden that the nonmoving party must

1 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
2 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
3 issues of controversy in favor of the nonmoving party only when the facts specifically
4 attested by that party contradict facts specifically attested by the moving party. The
5 nonmoving party may not merely state that it will discredit the moving party’s evidence
6 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
7 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
8 nonspecific statements in affidavits are not sufficient, and missing facts will not be
9 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

10 **B. Merits**

11 Mellinger brings two claims: (1) that she was sexually harassed by a coworker and
12 the Navy failed to effectively respond and (2) that her termination was motivated by
13 retaliation for her sexual harassment complaint. Dkt. 21 at 6. The Navy moves for
14 judgment on both.

15 **1. Sexual Harassment**

16 To establish a prima facie case of a hostile work environment caused by sexual
17 harassment, the plaintiff must show that because of her sex, “she was subjected to
18 unwelcome conduct that was ‘sufficiently severe or pervasive to alter the conditions of
19 [her] employment and create an abusive working environment.’” *Campbell v. Haw. Dep’t*
20 *of Edu.*, 892 F.3d 1005, 1016–17 (9th Cir. 2018) (quoting *Fuller v. Idaho Dept of Corr.*,
21 865 F.3d 1154, 1161 (9th Cir. 2017)). “The work environment must be both subjectively
22 and objectively perceived as abusive,” considering all circumstances and focusing on the

1 frequency and severity of the conduct, whether it was physically threatening or
2 humiliating, and whether it unreasonably interfered with the plaintiff's work
3 performance. *Id.* at 1017 (citing *Fuller*, 865 F.3d at 1161). None of these factors are
4 mandatory, and the necessary "severity or seriousness varies inversely with the
5 pervasiveness or frequency of the conduct." *Davis v. Team Elec. Co.*, 520 F.3d 1080,
6 1095 (9th Cir. 2008) (quoting *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872
7 (9th Cir. 2001)).

8 An employer defendant may be held accountable for the actions of an individual
9 who does not qualify as an employer "only if, after learning of the harassment, it failed to
10 take prompt corrective measures that were 'reasonably calculated to end the
11 harassment.'" *Campbell*, 892 F.3d at 1017 (9th Cir. 2018) (quoting *Freitag v. Ayers*, 468
12 F.3d 528, 539 (9th Cir. 2006)). "The most significant immediate measure an employer
13 can take in response to a sexual harassment complaint is to launch a prompt investigation
14 to determine whether the complaint is justified." *Swenson v. Potter*, 271 F.3d 1184, 1193
15 (9th Cir. 2001). "By opening a sexual harassment investigation, the employer puts all
16 employees on notice that it takes such allegations seriously and will not tolerate
17 harassment in the workplace." *Id.*

18 "[A]n employer's actions will not necessarily shield it from liability if harassment
19 continues." *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (citations
20 omitted). Whether corrective action ended the harassment is relevant to whether the
21 employer's actions were reasonable, though unsuccessful employer efforts are not
22 conclusive on the issue of unreasonableness. *Campbell*, 892 F.3d at 1018. Additionally,

1 reasonableness is evaluated “only from the perspective of what the employer knew or
2 should have known at the time it acted.” *Id.*

3 The parties focus their dispute on the reasonableness of the Navy’s response to
4 Mellinger’s complaint and the appropriate characterization of the April 25, 2016 staring
5 incident. The parties agree that the Navy’s obligation to act began on April 22, 2016
6 when Mellinger complained to Austin about Nnadede’s harassment. Dkt. 15 at 18; Dkt.
7 21 at 6. The parties also agree that the Navy responded promptly to Mellinger’s
8 complaint.

9 Mellinger argues, somewhat confusingly, that “even when, on April 25th, Mr.
10 Nnadede was assigned to work in a 20 square foot room with Ms. Mellinger, this would
11 not necessarily have exposed the employer to liability.” Dkt. 21 at 7. She concedes that
12 “assigning the two to different work crews appears to have been ‘reasonably calculated’
13 to keep them apart, per *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001).” *Id.* However,
14 Mellinger also argues that because after she reported that Nnadede was in her work
15 space, Bryant ordered her to continue working and Nnadede stared at her, making her feel
16 “like prey,” the Navy’s remedial action was not effective and allowed behavior Mellinger
17 had complained of to continue. Dkt. 21 at 7–9. She specifies

18 There is evidence in the record to show that Mr. Bryant, who had been
19 specifically ordered to make sure that Ms. Mellinger and Mr. Nnadede did
20 not work in proximity because she had made a sexual harassment
21 complaint, and who had been notified that this happened, actually ordered
22 Plaintiff back into close quarters with Mr. Nnadede. There is also evidence
in the record to show that he continued to engage in the same kind of
sexually harassing behavior (staring at her) that she had complained of.

1 *Id.* at 9. The Court thus understands Mellinger to argue that because a supervisor who
2 was aware of Mellinger’s complaint and aware of the Navy’s plan to keep the two apart
3 allegedly ordered Mellinger back to work in the small space and Nnadede continued to
4 stare at her for two to three hours, showing he was not deterred by the Navy’s actions, a
5 reasonable jury could conclude that the Navy’s plan was not effectively implemented.

6 The Navy argues that under *Swenson*, the degree of separation it imposed was
7 reasonably calibrated to “the severity of the alleged harassment and the evidence
8 provided to the employer in support of the complaint.” Dkt. 15 at 19 (quoting *Swenson*,
9 271 F.3d at 1192). The Navy also argues that it indisputably took steps that were
10 “*reasonably calculated* to end the harassment of which it was aware.” Dkt. 15 at 21; Dkt.
11 23 at 2 (quoting *Campbell*, 892 F.3d at 1018).

12 The Court finds that there is a genuine dispute of fact as to whether the Navy’s
13 response was effectively implemented. *Compare Reynaga v. Roseburg Forest Prods.*,
14 847 F.3d 678, 690 (9th Cir. 2017) (finding dispute of fact as to effectiveness when
15 plaintiff alleged continued harassment after harasser was counseled by management and
16 after employer attempted to separate parties but still assigned them to the same shift) *with*
17 *Campbell*, 892 F.3d at 1019 (finding no dispute of fact as to reasonableness of
18 employer’s response to harassment of teacher by students when the school investigated
19 each incident and imposed corrective measures reasonably tailored to each incident). The
20 Navy determined that the appropriate response to the behavior Mellinger alleged was to
21 keep Mellinger and Nnadede apart. Bryant, the work lead, declared that he had been told
22 to keep Mellinger and Nnadede apart. Though he does not recall ordering them to work in

1 the same space, Mellinger testified that she told Bryant that Nnadede was in her work
2 space, Bryant ordered her to continue working, and Nnadede stared at Mellinger's butt.
3 Though it is a close question especially given the Navy's prompt investigation, a
4 reasonable factfinder could conclude that the Navy's response was not implemented in a
5 manner reasonably calculated to end the harassment.

6 The Navy also argues that Mellinger concedes it is not liable for any of the
7 conduct that occurred before Mellinger's report, argues that Mellinger did not alert the
8 Navy that staring was part of her complaint, and argues that staring alone is not severe or
9 pervasive harassment. Dkt. 23 at 4–6 (citing, *inter alia*, *Swenson*, 271 F.3d at 1192;
10 *Campbell*, 892 F.3d at 1017). Regarding staring, the Navy argues that “[s]taring and
11 leering at another employee do not rise to the level of sexual harassment.” Dkt. 15 at 21
12 (citing, *inter alia*, *Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998)). The
13 Court finds that the Navy has not established as a matter of law that conduct which
14 occurred after notice must be severe or pervasive in isolation. *See Reynaga*, 847 F.3d at
15 687–90 (considering harassment which occurred both before and after plaintiff reported
16 to a supervisor); *but see Daniel v. Or. Health & Sci. Univ.*, No. 3:17-cv-542-SI, 2018 WL
17 3946530, at *4 (D. Or. Aug. 16, 2018) (finding employer acted reasonably in separating
18 employees and plaintiff did not establish that staring and leering following her complaint
19 was sufficiently harassing to support a hostile work environment).

20 Even accepting the Navy's argument that Mellinger did not report staring to
21 Austin, the Court finds that it is a question of fact whether staring is reasonably within
22 the type of sexually harassing conduct she did report and reasonably within the type of

1 conduct the Navy sought to prevent by separating the two employees. The Ninth Circuit’s
2 statement in *Swenson* that the plaintiff was not entitled to a harasser-free workplace
3 “merely because she complained about him” is distinguishable because in that case, the
4 Circuit determined that sexual harassment in fact did *not* continue after the employer
5 separated the parties (though the plaintiff testified she would sometimes see the alleged
6 harasser looking at her). 271 F.3d at 1192, 1195. In the instant case, a reasonable juror
7 could conclude that the implementation of the Navy’s response did not end the
8 harassment or deter future harassment.

9 Regarding the Navy’s liability, as noted, the Navy argues that Mellinger concedes
10 it can only be liable for harassment which occurred after Mellinger made her report. Dkt.
11 23 at 4–5. Mellinger’s response concedes that the Navy’s obligation to act began the day
12 she made her report but does not appear to concede that prior conduct is outside the
13 Navy’s potential liability. Dkt. 21 at 6. The Navy quotes *Swenson*’s statement that “the
14 employer’s liability, if any, runs only from the time it knew or should have known about
15 the conduct and failed to stop it.” Dkt. 15 at 18 (quoting *Swenson*, 271 F.3d at 1192)
16 (internal quotations and alterations omitted).

17 However, the beginning of the quoted paragraph provides that “[i]f the employer
18 fails to take corrective action after learning of an employee’s sexually harassing conduct,
19 or takes inadequate action that emboldens the harasser to continue his misconduct, the
20 employer can be deemed to have ‘adopt[ed] the offending conduct and its results, quite as
21 if they had been authorized affirmatively as to the employer’s policy.” *Swenson*, 271 F.3d
22 at 1192 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998)). Thus, a

1 question of fact as to the reasonableness of the Navy's response means the Navy could be
2 liable for conduct which occurred prior to notice. *Reynaga*, 847 F.3d at 690 (quoting
3 *Nichols*, 256 F.3d at 875–76) (“When the employer undertakes no remedy, or where the
4 remedy does not end the current harassment and deter future harassment, liability
5 attaches for both the past harassment and any future harassment.”).

6 Finally, even considering only the conduct Mellinger described in her written
7 statement to Austin—the conduct of which there is no dispute that the Navy was aware—
8 the Court finds a question of fact as to whether the conduct Mellinger describes was
9 sufficiently severe or pervasive to support her claim. *See Davis*, 520 F.3d at 1096 n.11
10 (excluding from its analysis conduct which the Ninth Circuit found disturbing but
11 management was not aware of). The written statement described three fairly explicit
12 sexual conversations over a period of approximately two months—a moderate
13 frequency—in addition to unwanted phone contact. Mellinger testified that she was
14 subjectively upset by the conduct to the degree that she arrived late to work repeatedly
15 and put her job at risk.

16 In *Davis*, the Ninth Circuit considered comments which occurred slightly more
17 than once a month over a seven-month period such as “this is a man's working world out
18 here” and “we don't mind if females are working as long as they don't complain,” and
19 concluded the question of sufficient hostility was for the factfinder. 520 F.3d at 1096.
20 The Circuit stated that “[i]n close cases such as this one, where the severity of frequent
21 abuse is questionable, it is more appropriate to leave the assessment to the fact-finder
22 than for the court to decide the case on summary judgment.” *Id.* The Court concludes that

1 the balance of frequency and severity Mellinger described results in a question that is
 2 similarly best reserved for the factfinder. Therefore, the Court denies the Navy's motion
 3 as to Mellinger's sexual harassment claim.

4 **2. Retaliation**

5 There is a three-step burden-shifting framework for considering summary
 6 judgment in an employment retaliation case. *Brooks v. City of San Mateo*, 229 F.3d 917,
 7 928 (9th Cir. 2000). To create a triable issue, the plaintiff first must establish a prima
 8 facie case by showing "(1) involvement in a protected activity, (2) an adverse
 9 employment action[,] and (3) a causal link between the two." *Id.* Second, the burden
 10 shifts to the defendant to present a legitimate reason for the adverse employment action.
 11 *Id.* Third, the burden shifts back to the plaintiff to "demonstrate a genuine issue of
 12 material fact as to whether the reason advanced by the employer was a pretext." *Id.* "Only
 13 then does the case proceed beyond the summary judgment stage." *Id.* A plaintiff may
 14 establish pretext "either directly by persuading the court that a discriminatory reason
 15 more likely motivated the employer or indirectly by showing that the employer's
 16 proffered explanation is unworthy of credence." *Texas Dep't of Comm. Affairs v.*
 17 *Burdine*, 450 U.S. 248, 256 (1981). "Circumstantial evidence of pretext must be specific
 18 and substantial in order to survive summary judgment." *Bergene v. Salt River Project*
 19 *Agr. Imp. & Power Dist.*, 272 F.3d 1136, 1142 (9th Cir. 2001).

20 Regarding the causation standard, the Navy argues that Mellinger must show her
 21 complaint was the but-for cause of her termination. Dkt. 15 at 15 (*Univ. of Tex. Sw. Med.*
 22 *Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)). However, it argues that under either a but-for

1 or a motivating factor standard, Mellinger does not meet her burden to show causation
2 between her protected activity and her termination. *Id.*

3 The Court previously determined that the causation standard for a federal
4 employee's retaliation claim under 29 U.S.C. § 2000e-16 is motivating factor and not
5 but-for. *Rosales v. Spencer*, No. C17-5781 BHS, 2019 WL 6913523, at *2–3 (W.D.
6 Wash. Dec. 19, 2019) (citing *Forman v. Small*, 271 F.3d 285, 296–97 (D.C. Cir. 2001)
7 (reasoning under that broad statutory “made free from” language in the Age
8 Discrimination in Employment Act, 29 U.S.C. § 633(a), retaliation based on underlying
9 complaints of status-based discrimination is construed more broadly in the federal
10 sector)). The Court reasoned that “made free from” language in 29 U.S.C. § 2000e-16
11 applicable to discrimination based on race, color, religion, sex, or national origin should
12 be applied to retaliation claims “consistent with Congress’s mandate that federal
13 employees shall be free from any discrimination whether it is a motivating factor in an
14 adverse decision or the reason for the adverse decision.” *Id.* at *3.

15 In *Babb v. Wilkie*, 140 S. Ct. 1168, 1171 (2020) (“*Babb*”), the Supreme Court held
16 that in a discrimination claim under § 633a(a), the “shall be made free from any
17 discrimination based on age” language applicable to federal employees does not require a
18 but-for causation standard. Instead, “age must be the but-for cause of *differential*
19 *treatment*, not . . . a but-for cause of the *ultimate decision*.” *Id.*⁵

20
21 ⁵ *Babb* was decided after the close of briefing in this case. *See* Dkt. 27. While *Babb* does not
22 require a showing of but-for causation in the employment outcome, it limits most forms of backward-
looking relief to plaintiffs who show but-for causation in the employment outcome and finds plaintiffs
who show but-for causation only of differential treatment may seek only forward-looking relief. *Babb*,
140 S.Ct. at 1177–78. The parties did not brief any potential applicability of this limitation to retaliation

1 “[R]etaliatio[n] claims may be brought against a much broader range of employer
2 conduct than substantive claims of discrimination.” *Annenberg v. Clark Cty. School Dist.*,
3 -- F. App’x. --, 2020 WL 3397748, at *2 (9th Cir. 2020) (quoting *Campbell*, 892 F.3d at
4 1021). “[S]omething done by an employer is an adverse employment action for purposes
5 of a retaliation claim—even if it does not materially alter a term or condition of
6 employment—as long as it would deter a reasonable employee from engaging in the
7 protected activity.” *Id.* (citing *Ray v. Henderson*, 217 F.3d 1234, 1242–42 (9th Cir.
8 2000)).

9 To the extent Mellinger argues that Austin’s decision to investigate her but not
10 Banks was an adverse employment action, the Court finds that there is insufficient
11 evidence in the record for a reasonable juror to conclude Austin in fact made such a
12 decision.

13 Mellinger cites two cases of male employees with camera phones treated more
14 leniently—Banks and the unnamed employee supervised by Parker. Regarding Banks,
15 two incidents appear in the record—the self-reporting incident, and the April 26, 2016
16 incident. Regarding the self-reporting incident, Mellinger declared that Banks was caught
17 with a camera phone while on Parker’s crew but permitted to self-report. Dkt. 22-1 at 7.
18 The Navy’s motion cites evidence that in this incident Banks actually self-reported,
19 which is typically treated more leniently. *See* Dkt. 18, ¶ 10. Mellinger appears to concede
20 this point in her opposition brief, arguing “[i]n this evidentiary showing, regarding

21 _____
22 claims or to the instant motion, so the Court considers the potential implications only to the extent
necessary to decide the issues briefed.

1 pretext, [she] is not claiming that the disparate treatment was terminating her after she
2 was found with a camera phone versus not terminating Mr. Banks when he self-reported
3 having brought a camera phone into the restricted area.” Dkt. 21 at 12.

4 Regarding the April 26, 2016 incident, Mellinger declared that when she and
5 Banks were seated next to each other, there was no way Austin could have missed
6 Banks’s phone, yet he only asked to see hers. Dkt. 22-1 at 7. Mellinger argues that this is
7 the relevant disparate treatment showing Austin’s decision to investigate was pretextual.
8 Dkt. 21 at 11 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)). The
9 Navy cites Austin’s statements in declaration that he asked to see Mellinger’s phone
10 because her behavior was suspicious and that he did not see Banks’s phone. Dkt. 17, ¶¶
11 21, 25. The Navy also cites Mellinger’s testimony that she did not “want to speculate”
12 when asked whether Austin in fact saw Banks’s phone, Dkt. 16-2 at 25, arguing that
13 Austin’s declaration is thus uncontradicted. Dkt. 23 at 11 (citing Dkt. 17, ¶ 25).

14 The Court agrees with the Navy. Mellinger testified that her knowledge of whether
15 or not Austin saw Banks’s phone would be speculative, and Austin declared he did not
16 see the Banks’s phone, but that Mellinger’s phone was visible and she reacted
17 suspiciously when asked about it. The Court thus finds there is insufficient evidence for a
18 reasonable factfinder to conclude Austin in fact saw Banks’s phone. *See, e.g. Loomis v.*
19 *Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) (speculation does not create dispute of fact on
20 summary judgment).

21 However, either Austin’s decision to report Mellinger to security and the resource
22 department or the termination itself may constitute an adverse employment action for the

1 purposes of a retaliation claim. *See Annenberg*, 2020 WL 3397748 at *2 (formal warning
2 and negative performance evaluation which go on personnel file and create risk of more
3 serious discipline in the future sufficient to support retaliation claim). The Navy argues
4 Mellinger cannot establish a prima facie case because she cannot establish that retaliation
5 caused her termination, Dkt. 15 at 15, and because she cannot establish that Austin
6 treated her differently from other employees, Dkt. 23 at 11. Mellinger argues that a jury
7 could find Austin took an adverse employment action against Mellinger when he reported
8 her camera violation and that this action caused her termination. Dkt. 21 at 13.

9 Regarding the termination itself as the adverse employment action, as a threshold
10 issue Mellinger's termination letter cited both her lateness and her camera violation. Dkt.
11 22-5 at 2. Mellinger argues that as the recommendation that she be terminated for
12 lateness was still pending at the time of the camera violation, the facts in the light most
13 favorable to her show that the camera phone actually caused the termination. Dkt. 21 at
14 11. The Navy cites Cox's declaration statement that the issues together constituted "more
15 than adequate grounds to recommend termination." Dkt. 23 at 9 (citing Dkt. 16-3 at 4).
16 Again considering Cox's statement in declaration that Reidel's recommendation for
17 termination was important to his decision and considering that Reidel's recommendation
18 was made the day of the camera violation, Dkt. 16-3 at 4, the Court agrees with Mellinger
19 that there is at least a dispute of fact as to whether the camera violation was the but-for
20 cause of the termination.⁶

21
22 ⁶ The Court reaches this decision without considering the parties' discussion in supplemental briefing of the hearing before the Employment Security Department.

1 However, the Court agrees with the Navy that Mellinger cannot establish that the
2 decision to terminate her was pretextual. Even if the lower causation standard is
3 applicable and she can establish the prima facie case, her evidence of pretext at the level
4 of the termination decision is not substantial and cannot defeat summary judgment.
5 *Bergene*, 272 F.3d at 1142. Mellinger denies that she is making a “cat’s paw” argument,
6 that Austin’s biased reporting influenced the adverse action. Dkt. 21 at 13. The Supreme
7 Court explains that “a supervisor’s biased report may remain a causal factor if the
8 independent investigation takes it into account without determining that the adverse
9 action was, apart from the supervisor’s recommendation, entirely justified.” *Staub v.*
10 *Proctor Hosp.*, 562 U.S. 411, 421 (2011). Here, while no independent investigation was
11 conducted, Mellinger does not dispute that the Navy’s decisionmaker, Cox, was
12 presented with an accurate report of her camera violation.

13 Mellinger’s remaining evidence of pretext is that Banks was permitted to self-
14 report a camera violation (prior to the alleged incident with Austin) and that the unnamed
15 employee on Parker’s crew was given a five-day suspension for his camera violation
16 rather than being terminated. In its request for supplemental briefing, the Court asked
17 Mellinger to address the Navy’s evidence that the unnamed employee was not
18 probationary. Dkt. 32 at 3–4. Further, the Court explained that it understood Mellinger to
19 concede that Banks in fact self-reported. *Id.* at 3. In response, Mellinger did not dispute
20 the Navy’s evidence regarding the unnamed employee or the facts of Banks’s self-
21 reporting. Instead, she argues “[e]ither there is a strict prohibition against cameras in the
22 restricted areas of the base, resulting in termination, and it applies to all cameras, no

1 matter who is carrying the camera . . . or there isn't." Dkt. 33 at 2. The Court finds this
2 argument fails to establish pretext. The Navy's evidence is uncontested that at the level of
3 human resources it treats self-reported camera violations more leniently but fires all
4 probationary employees who are reported caught with cameras in the CIA. Therefore,
5 there is no basis for a factfinder to determine that Cox's decision to fire Mellinger based
6 on her security violation differed from the Navy's decision to fire other probationary
7 employees.

8 Therefore, Mellinger's remaining argument is that Austin's decision to report her
9 camera violation constitutes an adverse employment action. Dkt. 21 at 13. Regarding the
10 prima facie case, the Navy does not contest that Mellinger engaged in protected activity.
11 It argues that Austin's decision to report Mellinger cannot be considered an adverse
12 employment action because Austin's reporting followed Navy policy. Dkt. 23 at 8. The
13 Court finds this argument more relevant to pretext rather than what can constitute an
14 adverse employment action. *See Annenberg*, 2020 WL 3397748, at *2 (formal warning in
15 personnel file can be adverse employment action but plaintiff retains burden to show
16 action was pretextual).

17 Considering causation, the Court has determined that Mellinger's evidence that
18 Austin treated her differently from Banks is unsupported. However, Clark declared that in
19 his experience, the practice of supervisors in Mellinger's shop was to not report
20 employees who were caught in a first camera violation. Dkt. 33-1 at 8–9. He declared that
21 he has caught approximately five employees, probationary and non-probationary, with
22

1 camera phones and not reported them, and he has “seen other supervisors do the same.”

2 *Id.*

3 Considering that Austin’s decision to report Mellinger came just two working days
4 after her harassment complaint, the Court concludes Mellinger has met her burden on the
5 prima facie case even if the but-for standard for differential treatment in *Babb*, 140 S. Ct.
6 at 1171, applies. *See Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1062 (9th Cir. 2013)
7 (temporal proximity is one way a plaintiff can establish retaliation was a motivating
8 factor for an adverse employment action). The plaintiff’s burden on the prima facie case
9 is minimal. *Fonseca v. Sysco Food Services of Az., Inc.*, 374 F.3d 840, 849 (9th Cir.
10 2004) (citing *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1148 (9th Cir. 1997)).

11 The parties do not dispute that the Navy has met its burden of production on a
12 legitimate, nondiscriminatory reason for Austin’s report. Whether Mellinger’s remaining
13 evidence is sufficient to support her burden to establish pretext is a much closer question,
14 particularly since any temporal inference from the proximity of Austin’s report to
15 Mellinger’s complaint is very weak given her admitted conduct. However, as the
16 factfinder’s determination will likely be driven by a weighing of Clark’s credibility
17 versus that of the Navy employees, the Court finds a question of fact as to pretext by the
18 narrowest of margins.

19 //

20 //

21 //

22 //

IV. ORDER

Therefore, it is hereby **ORDERED** that the Navy's motion for summary judgment, Dkt. 15, is **GRANTED in part** and **DENIED in part**.

Dated this 31st day of August, 2020.

A handwritten signature in black ink, appearing to read "Benjamin H. Settle", is written over a horizontal line.

BENJAMIN H. SETTLE
United States District Judge